

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CASSALLE L. NETTLES,

Defendant-Appellant.

UNPUBLISHED

June 20, 2000

No. 213130

Oakland Circuit Court

LC No. 97-154831-FC

Before: Hoekstra, P.J., and Cavanagh and White, P.J.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to twelve to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first contends that the trial court erred in admitting the testimony of prosecution witnesses Sergeant Steve Atkinson and Officer Michael Cupp regarding defendant's flight from police several days after the crime. Defendant asserts that the testimony was irrelevant and highly prejudicial. See MRE 401, 403. To preserve an evidentiary issue for appeal, the party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Because this issue is not preserved, this Court should reverse only if defendant establishes that he was prejudiced by the error or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Because defendant's claim is without merit, we find neither prejudice to defendant nor impairment to judicial proceedings. It is well established in Michigan law that evidence of flight is admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Although evidence of flight alone is insufficient to sustain a conviction, it is generally probative of a defendant's

consciousness of guilt. *Id.* Here, evidence of defendant's consciousness of guilt was relevant and highly probative because there was some inconsistency in the identification of defendant by eyewitnesses and because defendant presented several witnesses who testified he was elsewhere when the crime occurred. Furthermore, the evidence was not unduly prejudicial in light of the trial court's instruction to the jury that the evidence did not prove defendant's guilt. Because the testimony regarding defendant's flight was relevant to the identification of defendant and was not substantially more prejudicial than probative, there was no error in its admission.

II

Defendant next claims that his trial counsel was ineffective. A defendant that claims he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998).

Defendant first asserts that counsel was ineffective because he failed to object to the admission of the testimony of Sergeant Steve Atkinson and Officer Michael Cupp regarding defendant's flight from police. Because we find no error resulting from the admission of that testimony, defendant has failed to demonstrate that his counsel's performance was deficient. See *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Defendant also contends he was denied the effective assistance of counsel because defense counsel failed to call an expert witness to testify regarding the unreliability of eyewitness identifications. The decision whether to call an expert witness is presumed to be a permissible exercise of trial strategy. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defendant has not overcome that presumption. After carefully reviewing the record, we conclude that defense counsel could have reasonably concluded that discrepancies in the testimony identifying defendant, along with the testimony of several defense witnesses supporting defendant's alibi, was sufficient to place doubt in the minds of the jurors regarding the reliability of the testimony identifying defendant as the perpetrator of the crime. Therefore, defendant was not denied the effective assistance of counsel.

III

Next, defendant claims that his constitutional right to a jury drawn from a representative cross section of the community was violated because there was only one African-American in his jury array. A claim regarding the systematic exclusion of minorities from a jury array is reviewed de novo by this Court. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). Generally, a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the

community, but a defendant is not entitled to a jury that exactly mirrors the

community. *Id.* To establish a prima facie claim that a jury does not contain a fair cross section of members of the community, a defendant must show:

“(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant asserts that African-Americans were underrepresented in his particular jury array. However, it is not sufficient for defendant to merely assert that there were not enough African-Americans in his particular venire. Rather, a defendant must produce evidence concerning the underrepresentation of African-Americans on jury venires in general. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Therefore, because defendant failed to present proof regarding African-Americans in jury venires generally in Oakland County, he has failed to properly support his fair-cross-section claim. *Id.*

Moreover, defendant failed to present any evidence that any alleged underrepresentation was due to systematic exclusion of African-Americans in the jury-selection process. A bald assertion that systematic exclusion must have occurred because there was only one African-American in the array is not sufficient to support a claim of a violation of the fair-cross-section requirement. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). In fact, defendant supplies no detail whatsoever of the jury selection process to support his claim, other than that his particular venire contained just one African-American. Again, one incidence of a jury venire being disproportionate is not evidence of a systematic exclusion. *Howard, supra* at 533-534. Therefore, we reject defendant’s fair-cross-section claim.

IV

Finally, defendant contends the trial court erred in failing to strike challenged information from his presentence report. The record reveals that although the trial court did not make a finding of inaccuracy, it did not consider the challenged information in sentencing defendant. It is within the trial court’s discretion to disregard challenged information at sentencing without making a specific finding of inaccuracy. *People v Swartz*, 171 Mich App 364, 380-381; 429 NW2d 905 (1988). However, defendant was entitled to have the information stricken from his presentence report. *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985).¹

¹ The trial court’s error was harmless beyond a reasonable doubt. See *People v Fisher*, 442 Mich 560, 567, n4; 503 NW2d 50 (1993). Therefore, defendant is not entitled to resentencing. *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995), overruling on other grounds recognized by *People v Edgett*, 220 Mich App 686, 692-694; 560 NW2d 360 (1996).

Because the parties have stipulated to correct the presentence report, we need not remand this case for that action.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White